consequently that the accessory is not guilty as charged,[31] especially since the state, by the principle of second jeopardy, can never again inquire into the guilt of the principal. There is no injustice in the position that a record of acquittal shall be conclusive against the state, whereas a record of conviction shall be only *prima facie* evidence against the accessory. The state in its action against the principal had full opportunity to call and examine witnesses, and should be bound by an unfavorable result, involving the precise issue, to which it was party; whereas the accessory had not such opportunity to be heard, and should not, therefore, be prejudiced by a result unfavorable to him.[32] In the light of this analysis, it is submitted that the court, in the recent case of *People* v. *Beintner* (Sup. Ct. 1918) 168 N. Y. Supp. 945, which declared that in the trial of an accessory after the fact subsequent to the acquittal of his principal, the record of the acquittal of the principal was not admissible for any purpose, and which held that such acquittal was not a bar to the prosecution of the accessory, was in error, and that the indictment in that case against the accessory should have been dismissed.

THE CONFLICT IN THE CONCURRENT OPERATION OF STATE AND FEDERAL TAXES.—Inheritance taxation has come to be relied upon, both in this country and abroad, as an effective and just method of raising revenue. This mode of taxation has been recognized as a fitting instrument especially in the hands of the state governments because of their control over the descent and distribution of property upon death.[1] The federal government, nevertheless, imposed such taxes in the past[2] and, by the Act of September 8, 1916,[3] has again entered the field. The question obviously arises: to what extent shall each government recognize the tax of the other for the purpose of assessing its own?

In the first instance, it is necessary to examine the nature of in-

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[31] *Supra,* footnote 28.

[32] Spencer, J., in Maybee *v.* Avery (N. Y. 1820) 18 Johns., *352, expresses this idea by way of *dictum* as follows: "It is, undoubtedly, a rule, that to give a verdict, and judgment thereon in evidence, it must be upon the same point, and between the same parties or privies. The reason why it must be between the same parties is, that otherwise a man would be bound by a decision in which he was not at liberty to cross-examine the witnesses; and generally, the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict, if against him, cannot avail himself of it. One of the exceptions to the rule is, that where the matter in dispute is a question of public right, in that case, all persons standing in the same situation as the parties, are affected by it. It appears to me that a verdict on an indictment forms another exception, and upon the same principle." *Cf.* State *v.* Chittem, *supra.*

[1] See Mager *v.* Grima (1850) 49 U. S. 490; Eyre *v.* Jacob (1858) 55 Va. 422; State *v.* Alston (1895) 94 Tenn. 674, 30 S. W. 750; *In re* Joyslin (1903) 76 Vt. 88, 56 Atl. 281.

[2] Act of July 6, 1797, 1 Stat. 529, c. 11; Act of July 1, 1862, 12 Stat. 485, c. 119; Act of June 30, 1864, 13 Stat. 285, c. 173; Act of June 13, 1898, 30 Stat. 464, c. 448. For a brief account of federal inheritance taxation, see Knowlton *v.* Moore (1900) 178 U. S. 41, 50, 20 Sup. Ct. 747.

[3] Estate Tax, 39 Stat. 777, c. 463; amended by an increase of rates, Act of March 3, 1917, 39 Stat. 1002, c. 159; amended by new rates in addition to those already existing. Act of October 3, 1917, First Sess. 65th Congress 324, c. 63.

heritance taxes in order fully to understand the problem under consideration. They are said to be imposed, not upon property, but upon succession.[4] In attempting to be more definite, some courts have stated that the tax is upon the privilege of the decedent to transmit;[5] others, that it is upon the privilege of the beneficiary to take.[6] If the desired result can be reached more smoothly by traveling on the one theory rather than on the other, the courts have not hesitated to employ the one best suited.[7] It would seem that neither conception excludes the other. In order that an inheritance tax be levied, it is necessary that property pass from a decedent to a beneficiary. Such passing of property necessarily implies the power of the decedent to transmit and the privilege of the beneficiary to receive. To pick out one of these elements as the subject of the tax is merely arbitrary. The fact would seem to be, that an inheritance tax is a charge upon specific property levied when a particular event takes place, namely, death of the owner. An examination of the various statutes will show two types, one type placing the charge upon the estate as a unit, the other the most common, placing the charge upon the separate shares of the beneficiaries.[8]

The federal tax of 1898[9] was of the latter type. The New York court did not allow the deduction of this federal tax in computing the value of the property subject to its own tax, which was also in

[4]State *v.* Dalrymple (1889) 70 Md. 294, 17 Atl. 82; Matter of Hoffman (1894) 143 N. Y. 327, 38 N. E. 311; Minot *v.* Winthrop (1894) 162 Mass. 113, 38 N. E. 512; Wilmerding's Estate (1897) 117 Cal. 281, 49 Pac. 181; Magoun *v.* Illinois Trust and Savings Bank (1898) 170 U. S. 283, 18 Sup. Ct. 594; Martin *v.* Pollock (1916) 144 Ga. 605, 87 S. E. 793. It would seem that this distinction between property and succession is made only with the view of avoiding the general constitutional limitations upon direct taxation existing in this country. In England such distinction is not made. Randolph, United States Inheritance and Transfer Taxes 56.

[5]United States *v.* Perkins (1896) 163 U. S. 625, 16 Sup. Ct. 1073; Gleason and Otis, Inheritance Taxation 12.

[6]State *v.* Alston, *supra*; Gelsthorpe *v.* Furnell (1897) 20 Mont. 299, 51 Pac. 267; Stixrud's Estate (1910) 58 Wash. 339, 109 Pac. 343.

[7]Thus a New York tax upon a legacy to the United States government was sustained as a tax upon the privilege of the testator to transmit, United States *v.* Perkins, *supra*, evidently to avoid the seeming difficulty of a state taxing the privilege of the federal government. The statutory provision thus construed when embodied in a later New York statute was interpreted as taxing the privilege of the beneficiary to receive. See *In re* Gihon (1902) 169 N. Y. 443, 62 N. E. 561. It was held in Colorado that a legacy to the state university could not be taxed. *In re* Macky's Estate (1909) 46 Colo. 79, 102 Pac. 1075, because the tax was constructed as on the privilege to receive. The court stated that, had the tax been on the privilege of the testator to transmit, it would have been sustained.

[8]The statutes are generally not express as to whether the tax is on specific shares or on the entire estate, but it is usually easy to determine as to which class a particular statute belongs. Where rates of taxation are based upon a distinction between various classes of beneficiaries, either as to relationship or as to amounts received, the statute is clearly of the second type. See Gleason and Otis, *op. cit.* 647 et seq. for a collection of present state statutes.

[9]*Supra*, footnote 2. The rates were graduated according to the size of the interests passing and the relationship of the beneficiaries to the decedent. The Supreme Court in Knowlton *v.* Moore, *supra*, construed it as a tax on specific shares measured by the value of the specific shares.

effect a tax upon the specific shares of the beneficiaries, because, as the court declared the federal tax was on the privilege of the beneficiary to take.[10] It was intimated that if the federal tax had been "primarily payable out of the estate" the deduction would have been allowed. The Massachusetts court reached a contrary result, allowing the deduction, under a similar law, saying that the property to be taxed should be "the property which the legatee actually would get were it not for the state tax."[11] The New York view was undoubtedly harsh. Nevertheless, in the absence of express statutory provision as to deductions, and since such deductions as are usually allowed are charges upon the estate as a whole, it can be seen how a court might draw a line at this point and not include such claims as are chargeable against the specific shares of the beneficiaries. The rule as announced by the Massachusetts court, however, seems to be the most natural and reasonable one to apply in the construction of inheritance tax statutes in the absence of express provision.[12]

The question assumes a different aspect under the new federal estate tax. The present tax, unlike the tax of 1898, is a direct charge upon the net estate of the decedent bearing rates graduated according to the value of that estate with no reference to beneficiaries whatsoever.[13] As a charge upon the estate it is payable out of the *corpus* thereof as are the debts or the funeral expenses of the decedent or the ordinary administration expenses.[14] Therefore it would seem that it should also be deducted by a state which taxes the specific shares of beneficiaries. To illustrate the effect of the federal estate tax if it is considered as an administration expense, suppose A, in such a state, makes a will containing a residue clause. In case the specific

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[10] *In re* Gihon, *supra.*

[11] Hooper *v.* Shaw (1900) 176 Mass. 190, 57 N. E. 361. It is stated in the opinion that the federal authorities also deducted the amount of the state tax.

[12] It is impossible to determine from the opinion just how the deductions were made. The exact amount of the "property which the legatee actually would get were it not for the state tax", can be ascertained by algebraic process only, as the amount of each tax depends upon the deduction of the other. For example, suppose a legacy of $10,000 is subject to a federal tax of 2% and also to a state tax of 3%. The respective taxes would not be $200 and $300, but $193.88 and $294.18.

[13] Act of September 8, 1916, *supra,* § 201. "That a tax * * * , equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States." The same section then provides for percentages graduated according to the value of the net estate. Section 203 provides that the net estate should be determined by the deduction of legal claims against the estate, losses incurred during the settlement of the estate by fire, *etc.,* not compensated for by insurance, and such claims as are allowed by the laws of the jurisdiction in which the estate is being administered. In case of residents of the United States there is a further exemption of $50,000.

[14] The debts of the decedent are deducted from the estate before computing its value subject to any inheritance tax. Ross, Inheritance Taxation § 270 *et seq.* Expenses of administration, see Matter of Thomas (1902) 39 Misc. 223, 79 N. Y. Supp. 571, and funeral expenses, Matter of Maverick (1909) 135 App. Div. 44, 119 N. Y. Supp. 914, aff'd 198 N. Y. 618, 92 N. E. 1084, are also deducted. For the other deductions see Gleason and Otis, *op. cit.* 294, *et seq.*

legacies and devises exhaust all of the estate except $50,000 and the federal tax amounts to $50,000, the federal authorities would take all of this residue. The specific legacies and devises would go untouched for purposes of federal taxation. On the other hand, the state would be deprived of its tax on the residue and could not make up the amount thereby lost by additional levies on the beneficiaries, since the state tax is on the particular interests passing. And, of course, the residuary beneficiary would take nothing under the will. In case the specific legacies and devises exhaust all of the estate, the federal tax would still have to come out of the entire estate, as a general administration expense, but the effect would be to decrease the specific interests passing. The state authorities, under the theory that a tax on an estate as a whole is an administration expense, would have to deduct the amount of the federal tax. On the other hand, in both cases the federal authorities could justify a refusal to deduct the state tax, which is on the specific shares, on the ground that the federal tax does not concern itself at all with beneficiaries' interests but only with decedents' estates.[15]

The theory that the new federal tax should be construed as a general administration expense was supported in the recent case of *Bell's Estate* (Pa. Dist. Ct. 1917) 75 Legal Intelligencer 113, in which the court held that, since the federal tax is a direct charge upon the estate, it should be deducted as any other legal charge thereupon in computing the state tax. On the other hand, in the case of *Matter of Bierstadt* (1917) 178 App. Div. 836, 166 N. Y. Supp. 168, the New York court held that this federal tax should not be deducted, on the grounds that, if the federal tax is on the estate, it is therefore a direct tax on property and hence unconstitutional;[16] that, if it is on the transfer, it should not be deducted for the same reasons which controlled under the 1898 law.[17] As a matter of legal analysis the Pennsylvania decision seems sound. However, certain consequences reached by adequate legal analysis will be rejected by courts where

[15]It is submitted that where the state tax is on the decedent's estate, both the federal and state taxes should be deducted in the manner suggested in footnote 12, since they both form direct charges upon the whole estate.

[16]The statute has nothing to fear on the ground of directness. Thus, a tax graduated according to the value of the decedent's estate was laid in the form of a stamp tax by the Act of July 1, 1862, 12 Stat. 483, c. 119. Besides, Justice White seemed to intimate in Knowlton *v.* Moore, *supra,* that a tax which comes upon the happening of an event is not direct within the meaning of the federal constitution. The tax seems more objectionable on account of its inequalities due to a failure to provide for an adjustment of burdens among beneficiaries. In this connection it is well to bear in mind the words of Justice White at p. 77: "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of property of another, and thus bring about the profound inequalities which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems." For additional objections to the constitutionality of the federal estate tax see Gleason and Otis, *op. cit.* 486 *et seq.*

[17]The court cited *In re* Gihon, *supra,* in support of its decision. It must be remembered that in the former case the court intimated that, had the old federal tax been payable primarily out of the estate, it would have been deducted.

they run counter to such ends as they think desirable as measured by considerations of policy. After all, the question under consideration is fundamentally this: whether a state, having exclusive power to regulate descent and distribution of property upon death, should allow a decrease of its revenues derived from the exercise of such regulation in order to lessen the burden upon the beneficiaries because of additional taxation by the federal government on the same subject matter. It is, therefore, not difficult to see the point of view of the New York court in refusing to allow a deduction of the new federal tax, nor, for that matter, the point of view of the federal treasury officials in refusing to allow a deduction of the state tax.[18] Naturally, both desire to obtain as much revenue as possible from this particular field of taxation.

[18]Gleason and Otis, *op. cit.* 496.